RA Starostik · Schillstraße 9 · 10785 Berlin

Gericht der Europäischen Union
Rue du Fort Niedergrünewald
L-02925 Luxembourg

Vorab per Email

Rechtsanwaltskanzlei:
Schillstraße 9 · 10785 Berlin
Tel.: 00 49 - 30 - 88 000 3 - 0
Fax: 00 49 - 30 - 88 000 346
Email: Kanzlei@Starostik.de
http://www.starostik.de
USt-ID-Nr. DE165877648

Zweigstelle und
Kanzlei vereidigter Buchprüfer:
Schwarzenberger Straße 7 · 08280 Au
Tel.: 00 49 - 3771 - 564 700

Berlin, den 27.04.2012

Mein Zeichen: 00024-12/ms

KLAGESCHRIFT

des Herrn Dr. Patrick Breyer, [redacted]

- Klägers -

Verfahrensbevollmächtigter:
Rechtsanwalt Meinhard Starostik, Schillstr. 9, D-10785 Berlin

gegen

Europäische Kommission, 1049 Bruxelles

- Beklagte -

betreffend: Zugang zu Informationen

Ich beantrage namens und in Vollmacht des Antragstellers,

1. **die Entscheidung der Kommission vom 16.03.2012 zum Az. Ares(2012)313186 für nichtig zu erklären,**
2. **die Entscheidung der Kommission vom 03.04.2012 zum Az. Ares(2012)399467 für nichtig zu erklären, soweit kein Zugang zu den Schriftsätzen Österreichs im Verfahren C-189/09 gewährt worden ist,**
3. **der Kommission die Kosten aufzuerlegen.**

Ich erkläre mich damit einverstanden, dass Zustellungen an mich per E-Mail an die Adresse kanzlei@starostik.de erfolgen.

Inhaltsverzeichnis

I. Sachverhalt

1. Der Kläger ist Jurist und hat sich in seiner Dissertation wissenschaftlich mit dem Thema Vorratsdatenspeicherung auseinandergesetzt.

Entscheidung der Kommission vom 16.03.2012 zum Az. Ares(2012)313186

2. Die Kommission hat im vergangenen Jahr einen Bericht zur Evaluierung der Richtlinie 2006/24/EG vorgelegt und angekündigt, Änderungen an der Richtlinie vorzuschlagen. Die Kommission hat Anhörungen von Betroffenenvertretern durchgeführt (z.B. Mitgliedsstaaten, Justiz, Wirtschaft, Zivilgesellschaft, Datenschutzbeauftragte).

3. Gleichzeitig hat die Kommission bei ihrem Juristischen Dienst das Rechtsgutachten Ares(2010)828204 betreffend der Möglichkeit erstellen lassen, die Richtlinie 2006/24/EG so abzuändern, dass den EU-Mitgliedsstaaten freigestellt wird, ob sie Telekommunikationsdaten aller Bürger ohne Verdacht und Anlass für einen hypothetischen Bedarfsfall „auf Vorrat" speichern lassen. Das Rechtsgutachten betrifft ferner die Frage, auf welcher Rechtsgrundlage die EU eine Vorratsdatenspeicherung und den Zugang zu Vorratsdaten durch nationale Strafverfolgungsbehörden regeln kann.

4. Im Juni 2010 hatten über 100 zivilgesellschaftliche Organisationen aus 23 europäischen Staaten an die EU-Kommission appelliert, „einen Vorschlag zur Abschaffung der EU-Vorgaben zur Vorratsdatenspeicherung [...] vorzulegen". Unter den Unterzeichnern befinden sich Bürgerrechts-, Datenschutz- und Menschenrechtsorganisationen ebenso wie Telefonseelsorge- und Notrufvereine, Berufsverbände etwa von Journalisten, Juristen und Ärzten, Gewerkschaften, Verbraucherzentralen und auch Wirtschaftsverbände.

5. Gestützt auf das eingeholte Rechtsgutachten Ares(2010)828204 ihres juristischen Dienstes vertritt die EU-Kommission die Auffassung, es sei der EU rechtlich unmöglich, eine anlasslose Vorratsspeicherung von Telekommunikationsdaten nur in solchen Mitgliedsstaaten zu harmonisieren, welche entsprechende Vorschriften einführen. Außerhalb der Verträge dürfe die EU ihren Mitgliedsstaaten die Anwendung von Rechtsakten nicht freistellen.

6. Demgegenüber vertreten verschiedene unabhängige Juristen die Auffassung, es sei der EU-Kommission rechtlich möglich, eine anlasslose Vorratsspeicherung von Telekommunikationsdaten nur in solchen Mitgliedsstaaten zu harmonisieren, welche entsprechende Vorschriften einführen. Schon der ursprüngliche Artikel 15 RiL 2002/58/EG gestattete den Mitgliedsstaaten – optional –, Daten aufbewahren zu lassen, und definierte bestimmte Grenzen nur für diesen Fall (nur „aus den in diesem Absatz aufgeführten Gründen", nur „während einer begrenzten Zeit"). Weitere Beispiele solcher „alternativer Harmonisierung" fänden sich in Art. 1 RiL

2003/641/EG, Art. 25 2011/92/EU, Art. 9 pp. RiL 2006/123/EG und Art. 5 RiL 2001/29/EG.

7. Um sich mit der Rechtsmeinung der EU-Kommission wissenschaftlich auseinander setzen zu können, ist es erforderlich, die Argumente zu kennen, auf welche der juristische Dienst seine Rechtsauffassung stützt.

8. Unter dem 04.01.2012 hat der Kläger gemäß Verordnung (EG) 1049/2001 von der EU-Kommission Zugang zu dem Rechtsgutachten Ares(2010)828204 des Juristischen Dienstes der Kommission beantragt.

9. Am 09.03.2012 hat die Kommission den Antrag zurückgewiesen. Der Zweitantrag ist am 16.03.2012 zurückgewiesen worden.

   Beweis: Bescheid vom 16.03.2012 (Anlage A1)

Entscheidung der Kommission vom 03.04.2012 zum Az. Ares(2012)399467

10. Unter dem Az. C-189/09 reichte die Kommission gegen Österreich eine Vertragsverletzungsklage ein gestützt darauf, dass Österreich die Richtlinie 2006/24/EG nicht rechtzeitig umgesetzt hatte. Das Verfahren endete mit Urteil vom 29.07.2010. Österreich hat inzwischen ein Gesetz zur Umsetzung der Richtlinie verabschiedet.

11. Unter dem 30.03.2011 beantragte der Kläger gemäß Verordnung (EG) 1049/2001 bei der EU-Kommission Zugang zu allen Dokumenten jedweden Verfassers bezüglich der Umsetzung oder Nichtumsetzung der Richtlinie 2006/24/EG durch Österreich und Deutschland, einschließlich aller Dokumente betreffend das Gerichtsverfahren C-189/09.

12. Am 11.07.2011 lehnte die Kommission den Antrag ab.

13. Dem Zweitantrag des Klägers gab die Kommission am 03.04.2012 teilweise statt, führte jedoch bezüglich der Schriftsätze Österreichs im Verfahren C-189/09 aus, diese fielen nicht in den Anwendungsbereich der Verordnung 1049/2011 und seien folglich nicht von dem Antrag umfasst. Diese Schriftsätze wurden nicht herausgegeben.

    Beweis: Bescheid vom 03.04.2012 (Anlage A2)

II. Zulässigkeit

Entscheidung der Kommission vom 16.03.2012 zum Az. Ares(2012)313186

15. Die ablehnende Entscheidung der Kommission vom 16.03.2012 zum Az. Ares(2012)313186 ist dem Kläger am 16.03.2012 zugegangen, so dass die Klagefrist gewahrt ist.

Entscheidung der Kommission vom 03.04.2012 zum Az. Ares(2012)399467

16. Die ablehnende Entscheidung der Kommission vom 03.04.2012 zum Az. Ares(2012)399467 ist dem Kläger am 03.04.2012 zugegangen, so dass die Klagefrist gewahrt ist. Eine Entscheidung, wonach die VO 1049/2001 nicht anwendbar sei, ist wie eine ablehnende Entscheidung anfechtbar (BAT, T-311/00, Abs. 32).

III. Begründetheit

1. Nichtigkeit der Entscheidung der Kommission vom 16.03.2012 zum Az. Ares(2012)313186

a) Erster Klagegrund: Fehlerhafte Anwendung des Artikels 4 Absatz 2 zweiter Gedankenstrich VO 1049/2001/EG (Schutz der Rechtsberatung)

17. Artikel 4 Absatz 2 zweiter Gedankenstrich VO 1049/2001/EG bestimmt: „Die Organe verweigern den Zugang zu einem Dokument, durch dessen Verbreitung Folgendes beeinträchtigt würde: [...] der Schutz [...] der Rechtsberatung [...] es sei denn, es besteht ein überwiegendes öffentliches Interesse an der Verbreitung."

Erstes Element des ersten Klagegrundes: Keine Beeinträchtigung der Rechtsberatung

18. Die Kommission führt an, das streitige Rechtsgutachten sei nicht im Rahmen einer Gesetzgebungstätigkeit erstellt worden, sondern im Zuge interner Erörterungen einer möglichen Änderung der Richtlinie 2006/24/EG. Das Gutachten sei für die Kommissionsdienststelle erstellt worden, die für die Ausarbeitung von Vorschlägen für die Änderung der Richtlinie 2006/24/EG zuständig sei.

19. Die Kommission vertritt die Auffassung, eine Offenlegung würde ihr Interesse an einer freimütigen, objektiven und umfassenden Rechtsberatung auch in Zukunft erheblich beeinträchtigen.

20. Der Kläger macht demgegenüber geltend, dass das streitige Rechtsgutachten im Rahmen der Gesetzgebungstätigkeit der Kommission erstellt worden ist. Es betrifft nämlich die Frage, welche Möglichkeiten zur Änderung der Richtlinie 2006/24/EG bestehen. Die Tätigkeit der EU-Kommission bei der Vorbereitung von Richtlinienvorschlägen ist der Gesetzgebungstätigkeit zuzuordnen. Die Kommission hat auch bereits angekündigt, bis Juli 2012 einen Vorschlag zur Änderung der Richtlinie 2006/24/EG vorzulegen (Ratsdokument 18620/11 vom 15.12.2011).

21. Der Gerichtshof hat zwar im Fall Turco (C-39/05 P, Abs. 62 ff.) festgestellt, Artikel 4 Absatz 2 zweiter Gedankenstrich solle das Interesse eines Organs schützen, Rechtsgutachten anzufordern und freie, objektive und vollständige Stellungnahmen zu erhalten. Ein Organ könne sich jedoch hierfür nicht auf bloße Behauptungen berufen, die durch keinerlei substantiiertes Vorbringen gestützt werden.

22. Im vorliegenden Fall ist keine wirkliche, angemessen absehbare und nicht nur hypothetische, Gefahr einer Beeinträchtigung des Interesses an einer freien, objektiven

und vollständigen Rechtsberatung erkennbar. Substantiiertes Vorbringen der Kommission zu diesem Punkt, welches über Allgemeinplätze hinaus ginge, fehlt.

23. Umgekehrt dient es der Objektivität und Vollständigkeit der Rechtsberatung durch den Juristischen Dienst der Kommission, wenn dessen Stellungnahmen wissenschaftlich diskutiert werden können. Eine wissenschaftliche Diskussion sowie deren Erwartung durch den Juristischen Dienst trägt zur richtigen und sorgfältigen Rechtsfindung sowie zur Berücksichtigung aller Aspekte bei.

24. Wie der zweite Erwägungsgrund der Verordnung Nr. 1049/2001 ausführt, resultiert eine größere Transparenz in einer besseren Beteiligung der Bürger am Entscheidungsprozess und einer größeren Legitimität, Effizienz und Verantwortung der Verwaltung gegenüber dem Bürger in einem demokratischen Staatswesen.

Zweites Element des ersten Klagegrundes: Überwiegendes öffentliches Interesse

25. Die Kommission vertritt die Auffassung, das öffentliche Interesse an der Verbreitung des streitigen Gutachtens überwiege nicht das Interesse am Schutz der Rechtsberatung.

26. Der Gerichtshof hat im Fall Turco (C-39/05 P, Abs. 67 ff.) festgestellt, ein überwiegendes öffentliches Interesse sei darin zu sehen, dass die Verbreitung von Dokumenten, die die Stellungnahme des Juristischen Dienstes eines Organs zu Rechtsfragen enthalten, die bei der Diskussion über Gesetzesvorschläge aufgeworfen werden, geeignet ist, die Transparenz und die Offenheit des Gesetzgebungsverfahrens zu erhöhen und das demokratische Recht der europäischen Bürger, die Informationen zu überprüfen, auf deren Grundlage ein Rechtsakt ergangen ist, zu stärken, wie es insbesondere im zweiten und im sechsten Erwägungsgrund der Verordnung vorgesehen sei. Die Verordnung Nr. 1049/2001 sehe daher grundsätzlich eine Verpflichtung zur Verbreitung der Stellungnahmen des Juristischen Dienstes des Rates zu Gesetzgebungsverfahren vor. Eine Ausnahme sei denkbar im Fall eines spezifischen Rechtsgutachtens, das im Zusammenhang mit einem Gesetzgebungsverfahren erstellt wurde, aber besonders sensibel oder von besonders großer Tragweite sei, die über den Rahmen des betreffenden Gesetzgebungsverfahrens hinausgehe. In einem solchen Fall müsse das betreffende Organ die Verweigerung substantiiert begründen.

27. Bei dem hier streitigen Rechtsgutachten handelt es sich um die Stellungnahme des Juristischen Dienstes eines Organs zu Rechtsfragen, die bei der Diskussion über einen geplanten Gesetzesvorschlag der Kommission aufgeworfen wurden.

28. Die Richtlinie 2006/24/EG zur Vorratsdatenspeicherung ist besonders sensibel. Der Europäische Datenschutzbeauftragte hat zutreffend erklärt: „Die Richtlinie ist zweifellos das am meisten in die Privatsphäre eingreifende Instrument, das jemals von der EU im Hinblick auf Umfang und Anzahl der Menschen, die davon betroffen werden, angenommen wurde."

29. Schon der Entstehungsprozess der Richtlinie war sehr umstritten. Es handelte sich um das schnellste Gesetzgebungsverfahren der EU jemals. Es war von Bürgerprotesten, einer Ablehnung seitens der Datenschutzbeauftragten und Warnungen aus der Wirtschaft begleitet. Der federführende Bürgerrechtsausschuss beurteilte das Vorhaben sehr kritisch.

30. Gegen mehrere Umsetzungsgesetze sind Verfassungsbeschwerden und Klagen eingereicht worden. In Deutschland haben 34.000 Menschen Verfassungsbeschwerde eingereicht, die größte Verfassungsbeschwerde der Geschichte der Bundesrepublik. Die Verfassungsgerichte Rumäniens, Deutschlands und Tschechiens haben Umsetzungsgesetze als verfassungswidrig verworfen und die Richtlinie 2006/24/EG entweder für unvereinbar mit Grundrechten angesehen, die Frage nicht geprüft oder zumindest Zweifel angemeldet. Weitere Verfahren sind anhängig, etwa in Ungarn und Irland. In Österreich ist ein Verfahren in Vorbereitung. Über 100.000 Österreicher haben eine Eingabe gegen die verdachtslose Sammlung ihrer Verbindungsdaten unterzeichnet.

31. In Deutschland demonstrieren Zehntausende jährlich insbesondere gegen die verdachtslose Aufzeichnung ihrer Kommunikation, Bewegungen und Internetverbindungen. Nach mehreren Meinungsumfragen lehnen zwei Drittel der Deutschen eine anlasslose Sammlung ihrer Verkehrsdaten ab. Innerhalb der konservativ-liberalen Bundesregierung existiert seit 2010 eine politische Auseinandersetzung über diese Frage. An der Frage könnte die Regierung scheitern. Der liberale Koalitionspartner nimmt eine Vertragsverletzungsklage in Kauf und rechnet damit, dass die Richtlinie 2006/24/EG für unvereinbar mit den Gemeinschaftsgrundrechten und nichtig erklärt wird. Die deutsche Bundesjustizministerin hat erklärt: „Es gibt in der Geschichte der europäischen Integration keine andere Richtlinie, die umstrittener und problematischer ist als die Vorratsdatenspeicherung."

32. Im Juni 2010 hatten über 100 zivilgesellschaftliche Organisationen aus 23 europäischen Staaten an die EU-Kommission appelliert, „einen Vorschlag zur Abschaffung der EU-Vorgaben zur Vorratsdatenspeicherung [...] vorzulegen". Unter den Unterzeichnern befinden sich Bürgerrechts-, Datenschutz- und Menschenrechtsorganisationen ebenso wie Telefonseelsorge- und Notrufvereine, Berufsverbände etwa von Journalisten, Juristen und Ärzten, Gewerkschaften, Verbraucherzentralen und auch Wirtschaftsverbände.

33. Am 15. Juli 2011 haben 38 Nichtregierungsorganisationen der EU-Kommission geschrieben, wenn eine verdachtslose Vorratsdatenspeicherung nicht EU-weit verboten werde, müsse künftig zumindest den Mitgliedsstaaten freigestellt werden, ob sie eine solche Totalprotokollierung vornehmen lassen oder nicht, und dürfe die EU eine Harmonisierung nur für Staaten vornehmen, die sich überhaupt für diese drastische Maßnahme entschieden.

34. Die Kommission räumt selbst ein, die Frage der Vorratsdatenspeicherung sei aufgrund deren potenzieller Auswirkungen auf das Recht auf Privatsphäre und den Schutz personenbezogener Daten hochsensibel. Sie vertritt jedoch, gestützt auf das streitige Rechtsgutachten, die Auffassung, eine optionale Ausgestaltung der Richtlinie 2006/24/EG sei „entsprechend den Grundsätzen der Gleichbehandlung und der einheitlichen Anwendung in allen Mitgliedstaaten" „nicht möglich" (P-002286/2012). Aus diesem Grund bezieht die Kommission diesen zivilgesellschaftlichen Vorschlag in ihre Überlegungen und ihre Folgenabschätzung bezüglich der geplanten Änderung der Richtlinie 2006/24/EG nicht ein.

35. In der wissenschaftlichen Diskussion wird demgegenüber von unabhängigen Juristen die Meinung vertreten, es gebe verschiedene Beispiele von EU-Recht zur Harmonisierung einzelstaatlicher Grundrechtseingriffe nur in Mitgliedsstaaten, deren Recht solche Grundrechtseingriffe vorsehe (z. B. Artikel 1 2003/641/EG, Artikel 25 2011/92/EU, Artikel 9 ff. 2006/123/EG, Artikel 5 2001/29/EG, früherer Artikel 15 2002/58/EG). Es sei dementsprechend rechtlich möglich, die Vorratsdatenspeicherungsrichtlinie 2006/24/EG dahin gehend zu ändern, dass die Vorratsdatenspeicherung nicht länger allen Mitgliedsstaaten zwingend vorgeschrieben werde, sondern bloß nationale Vorratsspeicherungspflichten, wo vorhanden, zu regulieren und zu beschränken.

36. Vor diesem Hintergrund liegt auf der Hand, dass ein überragendes öffentliches Interesse an einer wissenschaftlichen Auseinandersetzung mit den Argumenten des Juristischen Dienstes der Kommission für dessen Auffassung, eine Aufhebung des EU-weiten Zwangs zur verdachtslosen Vorratsdatenspeicherung sei nicht möglich, besteht. Die besondere Sensibilität der Streitfrage der Vorratsdatenspeicherung verstärkt das öffentliche Interesse an dem Inhalt des Gutachtens und spricht nicht etwa gegen dessen Freigabe.

37. Dementsprechend haben Dutzende von Bürgern bei der Kommission bereits Zugang zu dem hier streitigen Rechtsgutachten beantragt.

38. Die Einschätzung des Juristischen Dienstes zum Gegenstand einer solchen fundierten Auseinandersetzung zu machen, schadet der Rechtsberatung durch den Dienst nicht, sondern trägt zu einer vollständigen und sorgfältigen rechtlichen Analyse sowohl in diesem wie auch in zukünftigen Fällen bei. Die Kommission hat ihre gegenteilige Auffassung nicht substantiiert und einzelfallbezogen begründet, sondern lediglich allgemeine Argumente angeführt, die für jedes Gutachten angeführt werden könnten.

39. In der Abwägung überwiegt das öffentliche Interesse an einer Kenntnis des Gutachtens klar.

40. Soweit der Gerichtshof für besonders sensible Rechtsgutachten eine Ausnahme in Betracht zieht, macht die Kommission nicht substantiiert geltend, dass das streitige Gutachten einen besonders sensiblen Inhalt aufweise.

41. Soweit der Gerichtshof eine Ausnahme für Rechtsgutachten in Betracht zieht, die besonders weit reichen und über einen Gesetzgebungsprozess hinaus gehen, macht die Kommission nicht substantiiert geltend, dass das streitige Gutachten einen derart weitreichenden Inhalt habe. Das Gutachten ist spezifisch im Kontext der Überarbeitung der Richtlinie 2006/24/EG in Auftrag gegeben worden. Dass sich ähnliche Fragen in anderem Zusammenhang stellen mögen, ist jedem Gutachten über die Auslegung abstrakter Rechtssätze immanent.

b) Zweiter Klagegrund: Fehlerhafte Anwendung des Artikels 4 Absatz 3 Unterabsatz 1 VO 1049/2001/EG (Schutz des Entscheidungsprozesses)

42. Artikel 4 Absatz 3 Unterabsatz 1 VO 1049/2001/EG bestimmt: „Der Zugang zu einem Dokument, das von einem Organ für den internen Gebrauch erstellt wurde oder bei ihm eingegangen ist und das sich auf eine Angelegenheit bezieht, in der das Organ noch keinen Beschluss gefasst hat, wird verweigert, wenn eine Verbreitung des Dokuments den Entscheidungsprozess des Organs ernstlich beeinträchtigen würde, es sei denn, es besteht ein überwiegendes öffentliches Interesse an der Verbreitung."

Erstes Element des zweiten Klagegrundes: Keine Beeinträchtigung des Entscheidungsprozesses der Kommission

43. Die Kommission führt an, sie habe noch keinen Beschluss über einen Vorschlag zur Änderung der Richtlinie 2006/24/EG gefasst. Eine Offenlegung des Rechtsgutachtens in diesem Stadium würde sich sehr negativ auf ihren Entscheidungsprozess auswirken. Denn eine Veröffentlichung des Rechtsgutachtens könnte zu „äußeren Einflüssen" auf die Kommission führen, die den Entscheidungsprozess ernstlich beeinträchtigen würden.

44. Die Kommission sei für ihren Entscheidungsprozess auf freie, objektive und vollständige Stellungnahmen angewiesen. Müsste der Juristische Dienst mit einer Offenlegung rechnen, würde er sich in Zukunft nur noch mit äußerster Vorsicht äußern. Dies würde den freien und unbefangenen Austausch von Ideen und Positionen innerhalb der Kommission beeinträchtigen und dazu führen, dass dem Kollegium nicht mehr alle Informationen zur Verfügung stünden, die es benötige, um fundierte Entscheidungen zu treffen.

45. Außerdem dürfe nicht die Möglichkeit der Kommission beeinträchtigt werden, einen anderen Rechtsstandpunkt einzunehmen als ihr Juristischer Dienst.

46. Der Kläger ist der Auffassung, dass die Öffentlichkeit ohnehin die Möglichkeit hat, Eingaben an die Kommission betreffend die beabsichtigte Änderung der Richtlinie 2006/24/EG zu richten. Würden infolge der Veröffentlichung des streitigen Rechtsgutachtens Stellungnahmen an die Kommission gerichtet, so würde dies deren Entscheidungsprozess keineswegs beeinträchtigen, sondern bereichern. Wie die Kom-

mission selbst schreibt, ist sie auf eine freie Erörterung der zur Entscheidung anstehenden Sachverhalte angewiesen.

47. Der Kläger ist weiter der Auffassung, dass es die Rechtsberatung durch den Juristischen Dienst nicht beeinträchtigt, wenn dessen Stellungnahmen öffentlich zugänglich sind und der Juristische Dienst dies weiß. Umgekehrt fördert es die Objektivität und Qualität der Rechtsberatung durch den Juristischen Dienst der Kommission, wenn dessen Stellungnahmen wissenschaftlich diskutiert werden können. Eine wissenschaftliche Diskussion trägt zur richtigen Rechtsfindung und zur Berücksichtigung aller Aspekte bei.

48. Wie der zweite Erwägungsgrund der Verordnung Nr. 1049/2001 ausführt, resultiert eine größere Transparenz in einer besseren Beteiligung der Bürger am Entscheidungsprozess und einer größeren Legitimität, Effizienz und Verantwortung der Verwaltung gegenüber dem Bürger in einem demokratischen Staatswesen.

49. Diese Erwägungen sind ersichtlich von ganz besonderer Bedeutung, wenn die Kommission Vorschläge für Rechtsakte vorbereitet, welche alle 500 Mio. EU-Bürger betreffen. Wie sich aus dem sechsten Erwägungsgrund der Verordnung Nr. 1049/2001 ergibt, ist eben im Bereich der Gesetzgebung ein umfassenderer Zugang zu Dokumenten zu gewähren. Transparenz in dieser Hinsicht trägt zur Stärkung der Demokratie bei, indem sie den Bürgern ermöglicht, alle Informationen zu überprüfen, auf deren Grundlage ein Rechtsakt erarbeitet wird.

50. Die Möglichkeit für die Bürger, sich über die Grundlagen der Gesetzgebungstätigkeit zu informieren, ist Voraussetzung dafür, dass sie ihre demokratischen Rechte effektiv ausüben können. Dazu gehört das Recht, Petitionen und Eingaben an die Kommission zu richten, bevor diese sich bereits eine abschließende Meinung zu einem Gesetzgebungsprojekt gebildet hat. Nach der Beschlussfassung ist es zu spät, auf den Willensbildungsprozess der Kommission noch einzuwirken. Die Kommission führt selbst aus, dass eine breite öffentliche Diskussion bezüglich aller Aspekte der Vorratsdatenspeicherung hilfreich und erwünscht ist.

51. Die Mitarbeiter des Juristischen Dienstes der Kommission können durchaus auch in der Öffentlichkeit ihre Rechtsmeinung äußern, wie dies ja beispielsweise auch der Generalanwalt am Gerichtshof oder die Parteien in einer mündlichen Verhandlung vor Gericht tun. Öffentlichkeit nutzt dem Prozess der rechtlichen Erörterung und schadet diesem nicht.

52. Schließlich schränkt eine Veröffentlichung des Rechtsgutachtens auch nicht die Möglichkeit der Kommission ein, eine andere Rechtsauffassung zu vertreten. Umgekehrt helfen der Kommission wissenschaftliche Auseinandersetzungen mit dem Rechtsgutachten des Juristischen Dienstes, dieses richtig einzuschätzen und zu würdigen und zu entscheiden, ob diesem zu folgen ist oder nicht.

Zweites Element des zweiten Klagegrundes: Überwiegendes öffentliches Interesse

53. Nach den Ausführungen zum zweiten Teil des ersten Klagegrundes, auf die Bezug genommen wird, besteht ein überragendes öffentliches Interesse an einer öffentlichen und wissenschaftlichen Auseinandersetzung mit den Argumenten des Juristischen Dienstes der Kommission für dessen Auffassung, eine Aufhebung des EU-weiten Zwangs zur verdachtslosen Vorratsdatenspeicherung sei nicht möglich.

54. Nach den Ausführungen zum ersten Teil des zweiten Klagegrundes, auf die Bezug genommen wird, schadet es dem Entscheidungsprozess der Kommission nicht, die Einschätzung des Juristischen Dienstes zum Gegenstand einer fundierten wissenschaftlichen Auseinandersetzung zu machen. Umgekehrt profitiert die Kommission von einer umfassenden Diskussion, wie sie auch selbst einräumt.

55. In der Abwägung überwiegt daher das öffentliche Interesse an einer Zugänglichmachung des Gutachtens klar.

2. Nichtigkeit der Entscheidung der Kommission vom 03.04.2012 zum Az. Ares(2012)399467, soweit kein Zugang zu den Schriftsätzen Österreichs im Verfahren C-189/09 gewährt worden ist

56. Artikel 2 Absatz 3 VO 1049/2001/EG bestimmt: „Diese Verordnung gilt für alle Dokumente eines Organs, das heißt Dokumente aus allen Tätigkeitsbereichen der Union, die von dem Organ erstellt wurden oder bei ihm eingegangen sind und sich in seinem Besitz befinden."

57. Die Kommission vertritt die Auffassung, diese Bestimmung sei nicht auf Dokumente Dritter anwendbar, von denen sie als Partei eines Verfahrens vor dem Gerichtshof eine Abschrift erhalten habe. Solche Dokumente könnten nur nach den restriktiven Regelungen herausverlangt werden, welche für den Gerichtshof gelten (Art. 15 Abs. 3 AEUV, Art. 16 Abs. 5 der Verfahrensordnung des Gerichtshofs). Andernfalls würden diese Bestimmungen ausgehöhlt.

58. Der Gerichtshof hat im Fall T-59/09 entschieden (Abs. 27 ff.), nach Art. 2 Abs. 3 der Verordnung Nr. 1049/2001 umfasse das Recht auf Zugang zu den Dokumenten der Organe nicht nur die von diesen Organen erstellten Dokumente, sondern auch die Dokumente, die sie von Dritten erhalten haben, zu denen – wie Art. 3 Buchst. b der Verordnung ausdrücklich klarstellt – auch die Mitgliedstaaten zählten. Seit dem Inkrafttreten der Verordnung Nr. 1049/2001 fielen alle Dokumente der Organe, ob sie von diesen erstellt wurden oder von Mitgliedstaaten oder anderen Dritten stammen, in den Anwendungsbereich dieser Verordnung und unterliegen damit deren Bestimmungen, insbesondere soweit diese die materiellen Ausnahmen vom Zugangsrecht beträfen.

59. Nicht anwendbar sind dementsprechend die für den Verfasser oder den Adressaten eines Dokuments geltenden Bestimmungen über den Informationszugang, hier die Bestimmungen des Gerichtshofs. Wenn die Kommission im Besitz eines Dokuments ist, finden die für sie geltenden Bestimmungen über den Informationszugang Anwendung, nämlich die Verordnung Nr. 1049/2001.

60. Dementsprechend sieht die Verordnung Nr. 1049/2001 auch einen besonderen Schutz von Gerichtsverfahren als Ausnahmetatbestand vor. Diese Bestimmung wiese keinen Anwendungsbereich auf, wenn gerichtliche Dokumente von vornherein nicht in den Anwendungsbereich der Verordnung fielen.

61. Tatsächlich ist der Gerichtshof im Fall API (C-514/07 P) selbstverständlich davon ausgegangen, dass Schriftsätze der Kommission an den Gerichtshof in den Anwendungsbereich der Verordnung Nr. 1049/2001 fallen. Wenn das fragliche Gerichtsverfahren mit einer gerichtlichen Entscheidung abgeschlossen worden ist, könne es durch eine Veröffentlichung nicht mehr beeinträchtigt werden und könne der Zugang zu eingereichten Schriftstücken der Kommission nicht mehr mit dieser Begründung verweigert werden, so der Gerichtshof zutreffend (Abs. 130 ff.).

62. Aus dieser Entscheidung ergibt sich, dass der Gerichtshof die Bestimmungen über den Zugang zu seinen Akten nicht entsprechend auf andere Organe der EU wie die Kommission anwendet, sondern die Verordnung Nr. 1049/2001 für einschlägig hält.

63. Die Bestimmungen über den Zugang zu den Akten des Gerichtshofs schützen alle Verfahrensbeteiligten gleichermaßen. Wenn nun die Kommission als Verfahrensbeteiligte hinsichtlich ihrer Schriftsätze der Verordnung Nr. 1049/2001 unterliegt, so gibt es keinen Grund dafür, die Schriftsätze anderer Parteien davon auszunehmen, wenn sie bei der Kommission eingegangen sind und sich in deren Besitz befinden. Denn diese Schriftsätze sind nicht schutzwürdiger als die Schriftsätze der Kommission selbst.

Rechtsanwalt Meinhard Starostik

Anlagen:
Sechs beglaubigte Abschriften der Klageschrift
Anlagen mit Verzeichnis samt sechs beglaubigter Abschriften
Zusammenfassung der Klagegründe und wesentlichen Argumente
Prozessvollmacht
Bescheinigung der Anwaltszulassung

Zusammenfassung der Klagegründe und wesentlichen Argumente

I. PARTEIEN
Kläger: Breyer
Wohnort: [redacted]
Vertreter: Rechtsanwalt Starostik
Beklagte: Kommission

II. GEGENSTAND
Antrag auf Nichtigerklärung der Entscheidungen der Kommission vom 16.03.2012 zum Az. Ares(2012)313186 und vom 03.04.2012 zum Az. Ares(2012)399467 über Anträge nach der Informationsfreiheitsverordnung 1049/2001/EG betreffend den Zugang zu Dokumenten bezüglich der Richtlinie 2006/24/EG zur Vorratsdatenspeicherung

III. ANTRÄGE
Der Kläger beantragt,

1. die Entscheidung der Kommission vom 16.03.2012 zum Az. Ares(2012)313186 für nichtig zu erklären,
2. die Entscheidung der Kommission vom 03.04.2012 zum Az. Ares(2012)399467 für nichtig zu erklären, soweit kein Zugang zu den Schriftsätzen Österreichs im Verfahren C-189/09 gewährt worden ist,
3. der Kommission die Kosten aufzuerlegen.

IV. KLAGEGRÜNDE UND WESENTLICHE ARGUMENTE

Zur Stützung der Klage macht der Kläger drei Klagegründe geltend.

1. Erster Klagegrund: Fehlerhafte Anwendung des Artikels 4 Absatz 2 zweiter Gedankenstrich VO 1049/2001/EG (Schutz der Rechtsberatung)

- Es beeinträchtigt nicht den Schutz der Rechtsberatung, das Rechtsgutachten Ares(2010)828204 des Juristischen Dienstes der Kommission zu veröffentlichen, welches die Frage erörtert, ob die Richtlinie 2006/24/EG so abgeändert werden kann, dass den EU-Mitgliedsstaaten freigestellt wird, ob sie Telekommunikationsdaten aller Bürger ohne Verdacht und Anlass für einen hypothetischen Bedarfsfall „auf Vorrat" speichern lassen oder nicht.
- Jedenfalls überwiegt das öffentliche Interesse an der Kenntnis des Gutachtens.

2. Zweiter Klagegrund: Fehlerhafte Anwendung des Artikels 4 Absatz 3 Unterabsatz 1 VO 1049/2001/EG (Schutz des Entscheidungsprozesses)

- Es beeinträchtigt nicht den Schutz des Entscheidungsprozesses der EU-Kommission, das Rechtsgutachten Ares(2010)828204 des Juristischen Dienstes der Kommission zu veröffentlichen, welches die Frage erörtert, ob die Richtlinie 2006/24/EG so abgeändert werden kann, dass den EU-

Mitgliedsstaaten freigestellt wird, ob sie Telekommunikationsdaten aller Bürger ohne Verdacht und Anlass für einen hypothetischen Bedarfsfall „auf Vorrat" speichern lassen oder nicht.

- Jedenfalls überwiegt das öffentliche Interesse an der Kenntnis des Gutachtens.

3. Dritter Klagegrund: Fehlerhafte Anwendung des Artikels 2 Absatz 3 VO 1049/2001/EG (Dokumente Dritter)

Die Schriftsätze eines Mitgliedsstaates (hier: Österreich) an den Europäischen Gerichtshof (hier: im Verfahren C-189/09), von denen die Kommission als Prozesspartei Abschriften erhalten hat, unterliegen entgegen der Auffassung der Kommission dem Anwendungsbereich der Informationsfreiheitsverordnung 1049/2001/EG.

Verzeichnis der Anlagen

Anlage A1:
Kopie der angefochtenen Entscheidung der Kommission vom 16.03.2012 zum Az. Ares(2012)313186
Zitiert auf Seite **Fehler! Textmarke nicht definiert.**, Abs. 9

Anlage A2:
Kopie der angefochtenen Entscheidung der Kommission vom 03.04.2012 zum Az. Ares(2012)399467
Zitiert auf Seite **Fehler! Textmarke nicht definiert.**, Abs. 13

Hinweis: Die Entscheidungen liegen bislang nicht in deutscher Übersetzung vor, diese mag erforderlichenfalls von der Kommission angefordert werden.

Ref. Ares(2012)313186 - 16/03/2012



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels, 16.03.2012
SG.B.5/MKu/psi/rc – Ares(2012)

Mr Patrick Breyer

by e-mail only:

Subject: Confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GestDem 2012/59

Dear Mr Breyer,

I refer to your email of 17 February 2012, in which you lodge a confirmatory application, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[1] (hereafter: Regulation 1049/2001).

1. SCOPE OF YOUR REQUEST

In your confirmatory application, you request a review of the position taken by the Director-General of the Legal Service on 17 February 2012, in his reply to your initial application of 5 January 2012. In your initial application, you requested access to the legal opinion of the Legal Service concerning the question whether Directive 2006/24/EC can be modified in a way as to leave its application to the choice of Member States. In its initial reply, the Legal Service identified the document you requested as being legal opinion referenced Ares(2010)828204. The Legal Service has informed you that partial access was only possible to the subject, reference and the first sentence of the introductory paragraph of that document but that these elements had no substantial content. Therefore, the Legal Service assumed that you were not interested in these elements and refrained from sending them. For the rest of the document, the Legal Service has refused access. In your confirmatory application of 17 February 2012, you maintain your initial application and do not request the partial access proposed by the Legal Service.

---

[1] OJ L145, 31.05.2001, p. 43.

2. Examination and conclusions

Having examined your request and the document concerned, I have come to the conclusion that the initial refusal by the Legal Service has to be confirmed for the reasons set out below.

3. Protection of legal advice

Article 4(2), second indent of Regulation 1049/2001 stipulates: *"The institutions shall refuse access to a document where disclosure would undermine the protection of: (...) legal advice (...) unless there is an overriding public interest in disclosure."*

In its judgment of 1 July 2008 in the *Turco* case[2], the Court of Justice clarified the examination to be undertaken by the institution when it is asked to disclose a document. Such examination must necessarily be carried out in three stages, corresponding to the three criteria established by the Court in that judgment. These stages include, first, the examination whether the document in question does indeed relate to legal advice (paragraph 38 of the *Turco* judgment), second, the examination whether disclosure of the parts of the document in question would undermine the protection of that advice (paragraph 40 of the *Turco* judgment) and third, the examination whether there is any overriding public interest justifying disclosure (paragraph 44 of the *Turco* judgment).

As regards the first criterion, the Director-General of the Legal Service has rightly pointed out in his letter of 17 February 2012 that the requested document contains the opinion of the Legal Service on whether it is legally possible to render the application of the Data Retention Directive optional. Therefore, it contains indeed legal advice.

Contrary to what you consider in your confirmatory application, the legal advice of the Commission's Legal Service is itself protected by Article 4(2), second indent of Regulation 1049/2001, without the need for intervention by an external lawyer. This is confirmed by the settled case law, including by the above-mentioned *Turco* judgment of the Court of Justice, which concerned a legal opinion of the Legal Service of the Council.

As regards the second criterion, I take the view that disclosure of the requested document would undermine the protection of the legal advice in question. In the above-mentioned case, the Court ruled that the purpose of this exception is *"to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice"* (paragraph 42 of the *Turco* judgment).

Indeed, concerning the issue at stake, which is subject to a particularly intense public debate, it is essential for the Commission to be able to obtain frank and comprehensive legal advice. In particular, such legal advice must give a thorough evaluation of the different options, including those, which the Commission may not retain in its final decision. Therefore, there is a real and concrete risk that disclosure of the document you request would be highly detrimental to the Commission's interest in seeking and obtaining frank, objective and comprehensive legal advice in the future in these matters.

---

[2] Judgment of 1 July 2008 in the Joined Cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union* (hereafter: *Turco*), paragraph 37, ECR 2008 Page I-04723.

I take note of the fact that in your confirmatory application, you consider that you already detain the result of the legal advice you request. However, I would underline that, even if this should be the case, it would not alter the need for protection of the document. Indeed, it is at least as much the legal reasoning as the actual conclusion that requires protection.

For these reasons, I conclude that the document you request is protected by Article 4(2), second indent of Regulation 1049/2001.

4. PROTECTION OF THE DECISION-MAKING PROCESS

Article 4(3), first subparagraph, of Regulation 1049/2001 foresees that *"[a]ccess to a document drawn up by an institution for internal use or received by an institution which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure"*.

As the Director-General of the Legal Service has rightly pointed out, the Commission has not taken any decision on the issue discussed in the document you request. A possible decision on a draft proposal for a revision of the Data Retention Directive would have to be taken by the College of Commissioners; in order to take a sound decision, the College must dispose of comprehensive and unbalanced information, including on the legal aspects.

Public disclosure of the document you request would reveal the Legal Service's opinions on the legal aspects of the issue. This would facilitate external interferences with the ongoing internal discussion process. Indeed, before the College decides on a possible proposal for a revision of the Data Retention Directive, the policy options, including their legal aspects, need to be thoroughly discussed between the services concerned, taking into account all aspects, including the point of view of the Legal Service. Disclosure of this point of view would therefore interfere with the Commission's internal deliberations in which all Commission services must be able to express their views freely, without prejudging the outcome of the deliberation. Indeed, disclosure would lead the Commission services and in particular the Legal Service to be very cautious in the future when writing this kind of documents. Given the collegiate nature of the Commission's decision-making process, this would seriously affect this process in that the services would not be able to exchange freely all possible ideas and positions and the College would not have at its disposal all elements for adopting sound decisions.

Therefore, the requested document cannot be disclosed, because its disclosure would seriously undermine the Commission's decision-making process.

5. PARTIAL ACCESS

I have also examined the possibility of granting partial access to the requested document, in accordance with Article 4(6) of Regulation No 1049/2001. However, I concur with the Director-General of the Legal Service that partial access is only possible to the subject, reference and the first sentence of the introductory paragraph and that these elements have no substantial content. In your confirmatory application, you did not request these elements, which the Director-General of the Legal Service offered to disclose on request.

Therefore I assume that you are not interested in them. The rest of the document is fully covered by the exceptions under Article 4(2), second indent and Article 4(3), first subparagraph of Regulation 1049/2001.

6. Overriding public Interest in Disclosure

The exceptions laid down in Article 4(2), second indent and 4(3), first subparagraph of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, i.e. it must outweigh the interests protected by virtue of Article 4(2), second indent and 4(3), first subparagraph of Regulation 1049/2001.

In what concerns the exception set out in Article 4(2), second indent, this is the third stage of the examination to be undertaken according to the *Turco* case law mentioned above.

In your confirmatory application, you argue that a public and scientific debate of the legal arguments given by the Legal Service and reactions by NGOs would be useful for the Commission. You underline the large public interest in the issue; in this context, you mention a joint letter sent to Commissioners Malmström, Reding and Kroes in 2010, the public opinion in Germany and recent judgments of the Romanian Constitutional Court and of the Irish High Court. Additionally, you observe that there is an interest of legal scholars in performing a legal analysis and scientific discussion of the Legal Service's opinion. You conclude that there is an overwhelming public interest in disclosure of the opinion of the Legal Service.

I understand the public interest in a transparent debate and I welcome the large participation of stakeholders, including NGOs, in that debate. However, I must observe that the Commission's decision-making on the issue is at a very early stage and that no legislative proposal has been adopted. In this situation, while the Commission welcomes, and participates in, the large public discussion that covers all aspects of the question of data retention, it must also have the possibility to prepare internally its own decision-making, drawing its own conclusions from the public debate.

In this situation, the here is no contradiction in the fact that, on the one hand, the Commission favours a large public debate on the issue and takes into account all opinions expressed, but that, on the other hand, it needs to prepare its internal decision-making, in particular by receiving opinions of the different services. On the contrary, it is beneficial to the Commission's decision-making. Such opinions must remain internal, at least at this stage of the procedure, in order to allow the Services to express their opinions freely and to allow the Commission to prepare its decisions having at its disposal all the elements it requires. This protection is even more important for opinions of the Legal Service. These opinions are only supposed to support the Commission's decision-making, but should not prejudge a decision by the College of Commissioners that could also be contrary to its conclusions.

In consequence, I consider that, in the present situation, the prevailing interest is the Commission's interest in protecting the opinions of its Legal Service, and in protecting its decision-making process.

Therefore, I consider that in this case there is no overriding public interest that would outweigh the interests protected by Article 4(2), second indent and by Article 4(3), first subparagraph of Regulation 1049/2001.

7. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,



Catherine Day

Ref. Ares(2012)399467 - 03/04/2012



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels,
SG.B.5/MIA/psi – Ares(2012)

Mr Patrick Breyer

By e-mail only:

Ständige Vertretung der Republik Österreich
S.E. Herrn Walter Grahammer

By e-mail only:

Subject: Confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2011/1748

Dear Sirs,

On 13 July 2011, the applicant lodged a confirmatory application for access to documents, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[1] (hereafter: Regulation n° 1049/2001).

With this confirmatory application, the applicant requested a review of the position taken by the Director-General for Home Affairs (hereafter DG HOME) on 11 July 2011, in its reply to his initial application dated 30 April 2011.

1. CONTEXT

Under Article 258 TFEU, the Commission initiated in 2007 infringement proceedings (n° 2007/1036) against Austria, for non-communication of the national implementing measures regarding Directive 2006/24/EC[2] on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. Given the failure to transpose this Directive within the prescribed period, the Commission brought the case to the Court of Justice.

---

[1] OJ L145, 31.05.2001, p. 43.

[2] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105 of 13/04/2006 Pages: 0054-0063.

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111
http://ec.europa.eu/dgs/secretariat_general/
E-mail: sg-acc-doc@ec.europa.eu

In its judgment of 29 July 2010 in case C-189/09, the Court of Justice decided that:

"... by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, the Republic of Austria has failed to fulfil its obligations under that directive."

After this judgment, the Commission monitored its implementation by Austria and since the latter did not communicate the national transposing measures, the Commission launched further infringement proceedings under Article 260 TFEU. A letter of formal notice was sent to Austria on 14 March 2011.

Despite the fact that the Austrian authorities adopted and communicated to the Commission on 27 May 2011 national legislation transposing Directive 2006/24, the Commission has not closed its proceedings under Article 260 TFEU since it is still examining certain provisions of that legislation. Consequently, these proceedings are still ongoing.

2. SCOPE OF THIS DECISION

In his confirmatory application, the applicanty requested:

'all documents related to the European Court case C-189/09 against Austria' and *'all other documents relating the transposition or non-transposition of directive 2006/24/EC by Austria and Germany [including] infringement proceedings against Austria and Germany for not transposing directive 2006/24/EC'.*

2.1. The decisions of 5 October 2011 and 12 December 2011

The Commission has replied to parts of the confirmatory application in two previous decisions of 5 October 2011 and 12 December 2011. With these decisions, the Commission granted access to the documents related to the closed infringement proceedings n° 2007/1071 against Germany. However, access to the documents related to infringement proceedings n° 2011/2091 against Germany, which are still ongoing, has been refused. The applicant was further informed that a separate decision would be taken with regard to the documents related to case C-189/09 against Austria and the transposition of the above-mentioned Directive. At that time, the consultations with the Austrian authorities were ongoing.

2.2. The present decision

Consequently, the present decision concerns:

- The documents belonging to the administrative file of the above-mentioned infringement proceedings n° 2007/1036 under both Article 258 and Article 260 TFEU. The documents concerned include the correspondence exchanged between the Commission and Austria as well as the Commission's internal documents. These documents are listed under items **(1)** to **(13)** and **(15)** of the enclosed list;
- The submissions addressed to the Court of Justice in the framework of case C-189/09. The documents submitted by the Commission to the Court are listed under items **(16)** and **(17)** of the enclosed list. The Commission's position on documents submitted by Austria to the Court is set out below.

The legislation communicated by Austria to the Commission, mentioned under item **(14)**, has been published[3]. Therefore, there is no need to take a position on this document.

Concerning submissions to the Court lodged by Austria, the Commission takes the view that they do not fall within the scope of Regulation 1049/2011 and therefore, they are not covered by the request.

Regulation (EC) N° 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[4] is based on ex-Article 255 of the EC Treaty. This Article has been replaced with Article 15(3) TFEU which provides that the European Court of Justice shall be subject to the rules on access to documents only when exercising its administrative tasks.

It must be observed, firstly, that the concerned submissions were addressed to the Court of Justice, and not to the Commission, which only received copies of these submissions as a party in the proceedings. Secondly, pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, written submissions are only communicated to the other parties and to the institutions, whose decisions are in dispute. In addition, Article 16(5)[5] of the Rules of the Procedure of the Court of Justice, foresee the possibility that *"[p]ersons having an interest may consult the register at the Registry and may obtain copies or extracts on payment of a charge on a scale fixed by the Court on a proposal from the Registrar. The parties to a case may on payment of the appropriate charge, also obtain copies of pleadings and authenticated copies of judgments and orders."* Similarly, Article 5(7) of the Instructions to the Registrar of the Court of First Instance[6] states that: *"[n]o third party, private or public, may have access to the case file or to the procedural documents without the express authorization of the President [...] after the parties have been heard. That authorisation may be granted only upon written request accompanied by a detailed explanation of the third party's legitimate interest in inspecting the file".*

---

3 Bundesgesetz, Nummer: I Nr. 27/2011; Amtsblatt: Bundesgesetzblatt für die Republik Österreich (BGBl.), Nummer: I Nr. 27/2011, Datum der Veröffentlichung: 18/05/2011, Inkrafttreten: 19/05/2011. Also accessible on Eur-Lex: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72006L0024:EN:NOT#FIELD_AT

4 OJ L 145, 31.05.2001, page 43.

5 http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/txt5.pdf.

6 OJ L 232, 04.09.2004, page 1.

Furthermore, in its judgment of 21 September 2010[7], the Court of Justice did not address the issue whether institutions should grant access to submissions other than their own.

For these reasons, the Commission takes the view that, as far as documents submitted in court proceedings are concerned, the scope of Regulation 1049/2001 is limited to the institution's own submissions, whereas submissions lodged by the other parties do not fall within its scope. Otherwise, the purpose of both the provision of the Article 15 TFEU, the Statute and the Rules of Procedure of the Court of Justice would be undermined.

Finally, by order of 9 December 2009, the Council was granted the right to intervene in Case C-189/09 at the stage of the oral procedure. However, since the Court decided on the case without a hearing, there are no Council documents falling within the scope of the request.

3. Examination of the Documents concerned and Conclusions

After a detailed examination of the documents identified in the enclosed list, I have reached the following conclusions:

- Full access is granted to the documents drawn-up by the Commission and relating to proceedings under Article 258 TFEU, including court proceedings. These documents are identified under items **(1)**, **(2)**, **(5)**, **(16)**, and **(17)** of the enclosed list. Copies are enclosed to this decision.
- Full access can also be granted to the documents originating from Austria and belonging to the administrative phase of the above-mentioned infringement proceedings under Article 258 TFEU. These documents are identified under items **(3)** and **(4)** of the enclosed list. However, they cannot be transmitted to the applicant at this stage for the reasons explained below.
- Partial access is granted to document **(15)**, a copy of which is also enclosed. However, access is refused to the entirety of documents under items **(6)** to **(13)** and to the non-disclosed parts of the document under item **(15)** for the reasons set out below. These documents have been established either by the Commission [documents (6), (7) and (15)] or by the Member State [documents (8) to (13)]. These documents form part of the administrative file of the procedure under Article 260 TFEU.

The reasons for this decision are set out below.

---

[7] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Association de la Presse Internationale (API)* judgment of 21 September 2010, *not yet reported*

4. MOTIVATION REGARDING DOCUMENTS (3) AND (4)

Since documents (3) and (4) originate from Austria, the Commission asked the Austrian authorities for their opinion pursuant to Article 4(5) of Regulation No 1049/2001 which provides that a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

The Commission reminded the Austrian authorities of the judgment of the Court of Justice's of 18 December 2007[8]. According to this judgment, if a Member State objects to the disclosure of documents originating form it, it must state reasons capable of showing that one (or more) of the exceptions to the right of access in Article 4(1) to (3) of Regulation No 1049/2001 applies. The Commission also referred to the judgement in the *API* case[9] in relation to the disclosure of documents once the Court has delivered a judgment under Article 258 and that judgment is followed by proceedings under Article 260 TFEU.

4.1. Position of the Member State

During the dialogue established with the Commission, the Austrian authorities objected to the disclosure of the above-mentioned documents on the ground that their disclosure would undermine the protection of court proceedings, in accordance with Article 4(2), second indent, of Regulation (EC) No 1049/2001.

The Austrian authorities emphasised that, although the College is examining whether to close the case, the infringement proceedings under Article 260(2) TFEU are still formally pending. It is important, particularly at this stage, that the discussions between the European Commission and the Republic of Austria on the closure of the case take place in an atmosphere of total serenity.

The Austrian authorities add that the dissemination of written submissions, while proceedings are still pending, could undermine the protection of the proceedings as provided for by Article 4(2), second indent, of Regulation (EC) No 1049/2001, especially where politically sensitive discussions are ongoing.

In Austria's view, no distinction may be drawn between the various stages of the proceedings for the purposes of the application of Article 4(2), second indent, of Regulation (EC) No 1049/2001 in relation to the disclosure of documents submitted in infringement proceedings. In this respect, they consider that the judgment of the Court of Justice in joined Cases C-514/07 P, C 528/07 P and C-532/07 P, *API*, only applies to the interpretation of Article 4(2), third indent, of Regulation (EC) No 1049/2001.

---

[8] Judgment of the Court of Justice of 18 December 2007 in Case C-64/05 Sweden v Commission [2007] ECR I-11389

[9] See footnote 7.

According to the Austrian authorities, the protection of court proceedings under Article 4(2), second indent of Regulation (EC) No 1049/2001 is in this context defined in wider terms than the exception aimed at protecting the purpose of investigation set out in Article 4(2), third indent, in so far it applies to the preliminary stages of the infringement proceedings as well as to the Article 258 and Article 260 phases[10].

In their view, the confidentiality of a dialogue aimed at achieving an amicable solution must be safeguarded, and this also applies in the context of an exchange of views between the European Commission and the Member State concerned prior to any court proceedings under Article 260(2) TFEU. Such a dialogue must be based on information and opinions exchanged freely and free from any external influence. It is a prerequisite that each party to the proceedings must be able to set out its standpoint in circumstances that do not place it at a clear disadvantage vis-à-vis the other party.

They conclude that such an objective cannot be achieved if documents are disclosed since they belong to complaints and infringement proceedings under Article 258 TFUE, which take place before court proceedings are initiated. They also consider that the Court conclusions in *API*[11] regarding access to the pleadings addressed to the Court apply *mutatis mutandis* to written submissions exchanged between the Commission and the Member State in the framework of the administrative phase of infringement proceedings under Article 258 TFEU. They add that the letter of formal notice, as well as the reasoned opinion, is sent to the Court with the Commission's application and are, therefore, an integral part of the Court's file. They also consider that procedures under Article 258 and 260 TFEU are closely linked, since a "260" procedure under Article 260 cannot be opened before a procedure under Article 258 is closed, even if these two procedures have a different subject-matter. In their view, the "court proceedings" exception should apply not only to a "stand alone" judicial procedure under Article 258 but also to a procedure under Article 260, including its administrative phase, since these procedures are so closely linked. In their view, the disclosure of the documents exchanged with the Commission in the context of proceedings under Article 258 before proceedings under Article 260 TFEU are closed would call into question the system of procedural rules governing the court proceedings before the EU Courts.

The Austrian authorities recognised that, at paragraph 122 of the *API* judgment, the Court rejected the presumption according to which documents relating to proceedings under Article 258 should be covered by an exception to the right of access until the proceedings under Article 260 are closed. However, they consider that the Court's findings concern the exception under Article 4(2), third indent. In their view, the "court proceedings" exception allows for a different interpretation since it is defined in a more open way.

---

10 *"...der „Schutz von Gerichtsverfahren" nach Art. 4 Abs. 2 zweiter Spiegelstrich der Verordnung (EG) 1049/2001 in diesem Zusammenhang weiter gefasst ist als der Schutz des „Zwecks von (...) Untersuchungs[tätigkeiten]" nach Art. 4 Abs. 2 dritter Spiegelstrich leg. cit., und er sich sowohl auf das Vorverfahren, als auch auf ein Vertragsverletzungsverfahren nach Art. 258 AEUV und ein solches nach Art. 260 AEUV erstreckt."]* Quoted from the original text in German

11 See footnote 7, points 91 à 100

Finally, as regards Article 4(5) of Regulation 1049/2001 and the nature of the Commission's appraisal of the Member State's reasoning, the Austrian authorities recall paragraph 88 of the judgment of the Court in case C-64/05 P. They maintain that an institution can only disclose the documents originating from a Member State against its refusal if its position is not entirely unaccompanied by a statement of reasons or that the reasons given are not framed in terms of the substantive exceptions listed in Article 4(1), (2) and (3) of Regulation No 1049/2001.

4.2. Evaluation by the Commission

The Commission has examined the Member State's arguments in order to determine whether they are *prima facie* proper. During this examination, the Commission took into account the interpretation of the exception invoked by the Member State, by the General Court and by the Court of Justice.

The Commission wishes to recall that, according to settled case law, the exceptions to the right of access must be interpreted and applied strictly and that the risk to an interest protected must be reasonably foreseeable and not purely hypothetical.

The Commission does not deny that the requested documents, namely the replies to a letter of formal notice and to a reasoned opinion, are highly relevant in the framework of the court proceedings under Article 258 TFEU and may also be protected by the exception relating to court proceedings. However, the risk to the interests protected by the exception aimed at protecting court proceedings as defined by the Court of Justice in its *API* judgment[12] must be reasonably foreseeable and not merely hypothetical. Since the proceedings under Article 258 are closed, a general presumption according to which disclosure of the concerned documents would undermine the protection of past or of possible future court proceedings cannot be accepted. This interpretation is confirmed by paragraphs 130-131 of the *API* judgment where the Court stated that, once the proceedings are closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court since those activities come to an end with the closure of the proceedings. This reasoning is also valid for the documents exchanged during the administrative phase of the proceedings and which form an integral part of the Court's file.

Consequently, the Austrian authorities should provide specific reasons capable of showing that disclosure of the documents concerned would specifically and effectively undermine the interests protected by the invoked exception.

---

[12] Cited under footnote 7. See in particular para. 85: "[...] it should be noted that the protection of court proceedings implies, in particular, that compliance with the principles of equality of arms and the sound administration of justice must be ensured."

In this regard, it is appropriate to recall the circumstances of the procedures in question. Firstly, proceedings under Article 258 TFEU were closed with the judgment of the Court in Case C-189/09. Secondly, the Commission launched a procedure under Article 260 aimed at ensuring implementation of the judgment of the Court in that Case, i.e. transposition of Directive 2006/24 into national law. Following the letter of formal notice, the Austrian authorities have communicated to the Commission the national measures transposing that Directive. Thirdly, the Commission is examining certain provisions of those measures in the context of the proceedings under Article 260 TFEU. However, should the Commission reach the conclusion that the national legislation fails to entirely or correctly transpose the Directive, a possible future action before the Court would, in any event, have a different subject matter from the action under Article 258 TFEU.

Consequently, in the Commission's view, the objection of the Austrian authorities to disclosure of documents under items (3) and (4) cannot be considered *prima facie* duly substantiated. Under these circumstances, the Commission is required to make its own assessment of the documents concerned in accordance with paragraph 88 of the judgment of 18 December 2007[13].

With regard to the arguments of the Austrian authorities as to the nature of the Commission's assessment of the objections of a Member State, the Commission wishes to refer to a recent judgment of the General Court in case T-59/09[14]. The General Court confirmed that the institution is *"...empowered to make sure that the grounds relied upon as justification for the Member State's objection to disclosure of the document requested, which must be given in the decision refusing access, adopted in accordance with Article 8(1) of Regulation No 1049/2001, are not unfounded."*

The General Court also underlined that the institution's review of the Member State's position is aimed at *"...preventing the adoption of a decision which it does not consider to be defensible".* The review *"... by the institution consists in determining whether, in the light of the circumstances of the case and of the relevant rules of law, the reasons given by the Member State for its objection are capable of justifying prima facie such refusal [...] and, accordingly, whether those reasons make it possible for that institution to assume the responsibility conferred on it under Article 8 of Regulation No 1049/2001. "*

Against this background and after a detailed examination of the requested documents under items (3) and (4) of the enclosed list I reached the conclusion that there is no exception set out in Regulation 1049/2001 which is applicable to them. Consequently, these documents shall be disclosed.

---

13 Judgment of the Court of Justice of 18 December 2007, Case C-64/05 Sweden v Commission [2007] ECR I-11389.

14 Judgment of the General Court of 14 February 2012, Case T-59/09 Germany v Commission (paragraphs 51, 53 and 54) (not yet reported).

However, since this decision is taken against the objections of the Member State from which the requested documents originate, the Commission will inform the Austrian authorities of this decision. The Commission will not disclose the documents until a period of ten working days has elapsed in accordance with Article 5(6) of the detailed rules for the application of Regulation No 1049/2001 attached to Decision No 2001/937/EC, ECSC, Euratom[15].

This time-period will allow the Austrian authorities to inform the Commission whether they object to the disclosure using the remedies available to them, i.e. an application for annulment and interim measures before the General Court. Once this period has elapsed, if the Austrian authorities have not signalled their intention to appeal against this decision by the means referred to above, the Commission will forward the above documents to the applicant.

5. EXAMINATION OF DOCUMENTS (6) TO (13) AND (15)

The requested documents described under items **(6)** to **(13)** and the non-disclosed parts of the document under item **(15)** have been drawn-up following the judgment of the Court of Justice of 29 July 2010 in case C-189/09. The documents are part of a follow-up investigation concerning the implementation of this judgment, which may lead to a request for a penalty under Article 260 TFEU. Despite the fact that the Austrian authorities have adopted national legislation transposing Directive 2006/24, these proceedings are not closed since, as indicated above, the Commission is examining certain provisions of that legislation. The documents exchanged contain the discussions between Austria and the Commission concerning the conditions and the appropriateness of these infringement proceedings. The file also contains internal documents containing the assessment of the infringement by Commission services. All these documents are relevant for a decision to be taken by the College regarding these infringement proceedings.

Under these circumstances, early disclosure of the entirety of documents **(6)** to **(13)** and of the non-disclosed parts of document **(15)** will adversely affect the dialogue between the Austrian authorities and the Commission. Consequently, the purpose of this investigation, which is to achieve conformity with EU law without, if possible, having recourse to the means provided for under Article 260(2) TFEU, would be undermined. In order to reach this aim, extensive discussions with the Member State concerned are necessary, which require a climate of mutual trust. Disclosure of the documents concerned at this stage would seriously undermine the atmosphere of mutual trust between the Austrian authorities and the Commission.

This interpretation has been confirmed by the Court of First Instance (now General Court) in particular in paragraph 68 of the *Petrie* judgment[16].

---

15 OJ L 345, 29.12.2001, p. 94.

16 Judgment of 11 December 2001 in the case T-191/99, [2001] ECR II-3677.

This paragraph states that *" [...] [a]s the Court pointed out in paragraph 63 of its judgement in WWF (cited above in paragraph 59), the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgement of the Court of Justice.[...]"*

Contrary to the opinion expressed by the applicant in the confirmatory application, this reasoning is applicable in this case. The ECJ held in paragraph 122 of the judgment in the case *Sweden v API and Commission*[17] that *"it cannot be presumed that disclosure of pleadings lodged in a procedure which ultimately led to the delivery of a judgment on the basis of Article 226 EC*[18] *undermines investigations which could lead to proceedings being brought under Article 228 EC"*[19]. The Court argued that these *"constitute two distinct procedures, each with its own subject-matter"*.

However, in contrast to the documents in the *Sweden v API and Commission* case, documents **(6)** to **(13)** and the non-disclosed parts of document **(15)** of the request do not stem from the preceding procedure under Article 258 TFEU, which was closed by the judgment of 29 July 2010, but were originally drawn up in course of the procedure under Article 260 TFEU, which is still ongoing.

Following the above considerations, disclosure of documents, which have been drawn up in the framework of the procedure under Article 260 TFEU, can indeed *undermine investigations, which could lead to proceedings being brought under this provision*, a distinct, investigative procedure with its own subject matter. This is precisely the case for the entirety of the documents mentioned in the enclosed list under items **(6)** to **(13)** and for the non-disclosed parts of document **(15)**. As outlined above, their disclosure would seriously affect the climate of mutual trust necessary for successful negotiations between the Austrian authorities and the Commission on the modalities of the fulfilment of the obligations under EU law, thus undermining the purpose of this investigation.

---

[17] Judgment of 21 September 2010 in the joined cases C-514/07 P, C-528/07 P and C-532/07 P, not yet reported

[18] Now Article 258 TFEU

[19] Now Article 260 TFEU

In addition to this, it is to be noted that in interpreting Article 4(2), third indent, of Regulation No 1049/2001 the Court of Justice has emphasised the bilateral nature of an administrative procedure between the Commission and the Member State concerned. Indeed, the Court stated in paragraph 58 of the judgment of 29 June 2010 in case C-139/07 P[20] that "*the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file. Account must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent, of Regulation No 1049/2001. If those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's administrative file, the system for the review of State aid would be called into question*". As in a procedure for reviewing State aid, infringement proceedings based on Article 260 TFEU are of a bilateral nature in which the Commission's position is addressed only to the Member State concerned. Consequently, the above interpretation by the Court of Justice applies directly in infringement proceedings.

In the light of the above, I consider that access to the documents **(6)** to **(13)** and to the non-disclosed parts of document **(15)** has to be refused since they are covered by the exception provided for in Article 4(2), third indent, of Regulation 1049/2001, which provides that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: (...) the purpose of inspections, investigations and audits*".

5.1. Partial access

I have also examined the possibility of granting partial access to the refused documents, under items **(6)** to **(13)** in accordance with Article 4(6) of Regulation 1049/2001. However, partial access is not possible considering that they are at this stage of the infringement proceedings entirely covered by the exception under Article 4(2), third indent of the Regulation.

5.2. Overriding public interest in disclosure

The exception laid down in Article 4(2), third indent of the Regulation must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. The issues at stake are undoubtedly of public interest and warrant an infringement procedure under Article 260 TFEU.

However, I consider that in this particular case, the public interest is better served by protecting the purpose of the investigation in the ongoing infringement proceedings namely obtaining Austria's compliance with the judgment of the Court of 29 July 2010 and with its obligations under EU law

[20] Judgment of 29 June 2010 in the case C-139/07 P, Commission v Technische Glasswerke Ilmenau, not yet reported.

Consequently, I see no elements capable of showing the existence of an overriding public interest.

6. MEANS OF REDRESS FOR THE APPLICANT

The applicant may challenge this decision, insofar as no access is granted to documents (6) to (13) and to parts of document (15), either by bringing proceedings before the General Court or by filing a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



Catherine Day

Enclosures: List of documents
Six documents (one expunged)

Prozessvollmacht

Hiermit bevollmächtige ich Rechtsanwalt Meinhard Starostik (Berlin), mich in dem Rechtsstreit gegen die Kommission wegen Nichtigerklärung der Entscheidungen der Kommission vom 16.03.2012 zum Az. Ares(2012)313186 und vom 03.04.2012 zum Az. Ares(2012)399467 zu vertreten.

____

Kläger Patrick Breyer (Wald-Michelbach)



Rechtsanwaltskammer Berlin · Littenstraße 9 · 10179 Berlin

Herrn Rechtsanwalt
Meinhard Starostik
Schillstraße 9
10785 Berlin

Geschäftszeichen: I-RA St 336

BESCHEINIGUNG

Hiermit wird bescheinigt, dass

Rechtsanwalt vBP
Meinhard Starostik

in Berlin als Rechtsanwalt vBP zugelassen, Mitglied der hiesigen Rechtsanwaltskammer ist und den Anwaltsberuf unter der im Anschriftenfeld angegebenen Anschrift ausübt.

Berlin,27.04.2012

Ehrig
Geschäftsführer

Rechtsanwaltskammer Berlin 10

Ref. Ares(2012)313186 - 16/03/2012



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels, 16.03.2012
SG.B.5/MKu/psi/rc – Ares(2012)

Mr Patrick Breyer

by e-mail only:

Subject: Confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GestDem 2012/59

Dear Mr Breyer,

I refer to your email of 17 February 2012, in which you lodge a confirmatory application, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[1] (hereafter: Regulation 1049/2001).

1. SCOPE OF YOUR REQUEST

In your confirmatory application, you request a review of the position taken by the Director-General of the Legal Service on 17 February 2012, in his reply to your initial application of 5 January 2012. In your initial application, you requested access to the legal opinion of the Legal Service concerning the question whether Directive 2006/24/EC can be modified in a way as to leave its application to the choice of Member States. In its initial reply, the Legal Service identified the document you requested as being legal opinion referenced Ares(2010)828204. The Legal Service has informed you that partial access was only possible to the subject, reference and the first sentence of the introductory paragraph of that document but that these elements had no substantial content. Therefore, the Legal Service assumed that you were not interested in these elements and refrained from sending them. For the rest of the document, the Legal Service has refused access. In your confirmatory application of 17 February 2012, you maintain your initial application and do not request the partial access proposed by the Legal Service.

---

[1] OJ L145, 31.05.2001, p. 43.

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111
http://ec.europa.eu/dgs/secretariat_general/
E-mail: sg-acc-doc@ec.europa.eu

2. EXAMINATION AND CONCLUSIONS

Having examined your request and the document concerned, I have come to the conclusion that the initial refusal by the Legal Service has to be confirmed for the reasons set out below.

3. PROTECTION OF LEGAL ADVICE

Article 4(2), second indent of Regulation 1049/2001 stipulates: *"The institutions shall refuse access to a document where disclosure would undermine the protection of: (...) legal advice (...) unless there is an overriding public interest in disclosure."*

In its judgment of 1 July 2008 in the *Turco* case[2], the Court of Justice clarified the examination to be undertaken by the institution when it is asked to disclose a document. Such examination must necessarily be carried out in three stages, corresponding to the three criteria established by the Court in that judgment. These stages include, first, the examination whether the document in question does indeed relate to legal advice (paragraph 38 of the *Turco* judgment), second, the examination whether disclosure of the parts of the document in question would undermine the protection of that advice (paragraph 40 of the *Turco* judgment) and third, the examination whether there is any overriding public interest justifying disclosure (paragraph 44 of the *Turco* judgment).

As regards the first criterion, the Director-General of the Legal Service has rightly pointed out in his letter of 17 February 2012 that the requested document contains the opinion of the Legal Service on whether it is legally possible to render the application of the Data Retention Directive optional. Therefore, it contains indeed legal advice.

Contrary to what you consider in your confirmatory application, the legal advice of the Commission's Legal Service is itself protected by Article 4(2), second indent of Regulation 1049/2001, without the need for intervention by an external lawyer. This is confirmed by the settled case law, including by the above-mentioned *Turco* judgment of the Court of Justice, which concerned a legal opinion of the Legal Service of the Council.

As regards the second criterion, I take the view that disclosure of the requested document would undermine the protection of the legal advice in question. In the above-mentioned case, the Court ruled that the purpose of this exception is *"to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice"* (paragraph 42 of the *Turco* judgment).

Indeed, concerning the issue at stake, which is subject to a particularly intense public debate, it is essential for the Commission to be able to obtain frank and comprehensive legal advice. In particular, such legal advice must give a thorough evaluation of the different options, including those, which the Commission may not retain in its final decision. Therefore, there is a real and concrete risk that disclosure of the document you request would be highly detrimental to the Commission's interest in seeking and obtaining frank, objective and comprehensive legal advice in the future in these matters.

---

[2] Judgment of 1 July 2008 in the Joined Cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union* (hereafter: *Turco*), paragraph 37, ECR 2008 Page I-04723.

I take note of the fact that in your confirmatory application, you consider that you already detain the result of the legal advice you request. However, I would underline that, even if this should be the case, it would not alter the need for protection of the document. Indeed, it is at least as much the legal reasoning as the actual conclusion that requires protection.

For these reasons, I conclude that the document you request is protected by Article 4(2), second indent of Regulation 1049/2001.

4. PROTECTION OF THE DECISION-MAKING PROCESS

Article 4(3), first subparagraph, of Regulation 1049/2001 foresees that *"[a]ccess to a document drawn up by an institution for internal use or received by an institution which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure"*.

As the Director-General of the Legal Service has rightly pointed out, the Commission has not taken any decision on the issue discussed in the document you request. A possible decision on a draft proposal for a revision of the Data Retention Directive would have to be taken by the College of Commissioners; in order to take a sound decision, the College must dispose of comprehensive and unbalanced information, including on the legal aspects.

Public disclosure of the document you request would reveal the Legal Service's opinions on the legal aspects of the issue. This would facilitate external interferences with the ongoing internal discussion process. Indeed, before the College decides on a possible proposal for a revision of the Data Retention Directive, the policy options, including their legal aspects, need to be thoroughly discussed between the services concerned, taking into account all aspects, including the point of view of the Legal Service. Disclosure of this point of view would therefore interfere with the Commission's internal deliberations in which all Commission services must be able to express their views freely, without prejudging the outcome of the deliberation. Indeed, disclosure would lead the Commission services and in particular the Legal Service to be very cautious in the future when writing this kind of documents. Given the collegiate nature of the Commission's decision-making process, this would seriously affect this process in that the services would not be able to exchange freely all possible ideas and positions and the College would not have at its disposal all elements for adopting sound decisions.

Therefore, the requested document cannot be disclosed, because its disclosure would seriously undermine the Commission's decision-making process.

5. PARTIAL ACCESS

I have also examined the possibility of granting partial access to the requested document, in accordance with Article 4(6) of Regulation No 1049/2001. However, I concur with the Director-General of the Legal Service that partial access is only possible to the subject, reference and the first sentence of the introductory paragraph and that these elements have no substantial content. In your confirmatory application, you did not request these elements, which the Director-General of the Legal Service offered to disclose on request.

Therefore I assume that you are not interested in them. The rest of the document is fully covered by the exceptions under Article 4(2), second indent and Article 4(3), first subparagraph of Regulation 1049/2001.

6. Overriding public Interest in Disclosure

The exceptions laid down in Article 4(2), second indent and 4(3), first subparagraph of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, i.e. it must outweigh the interests protected by virtue of Article 4(2), second indent and 4(3), first subparagraph of Regulation 1049/2001.

In what concerns the exception set out in Article 4(2), second indent, this is the third stage of the examination to be undertaken according to the *Turco* case law mentioned above.

In your confirmatory application, you argue that a public and scientific debate of the legal arguments given by the Legal Service and reactions by NGOs would be useful for the Commission. You underline the large public interest in the issue; in this context, you mention a joint letter sent to Commissioners Malmström, Reding and Kroes in 2010, the public opinion in Germany and recent judgments of the Romanian Constitutional Court and of the Irish High Court. Additionally, you observe that there is an interest of legal scholars in performing a legal analysis and scientific discussion of the Legal Service's opinion. You conclude that there is an overwhelming public interest in disclosure of the opinion of the Legal Service.

I understand the public interest in a transparent debate and I welcome the large participation of stakeholders, including NGOs, in that debate. However, I must observe that the Commission's decision-making on the issue is at a very early stage and that no legislative proposal has been adopted. In this situation, while the Commission welcomes, and participates in, the large public discussion that covers all aspects of the question of data retention, it must also have the possibility to prepare internally its own decision-making, drawing its own conclusions from the public debate.

In this situation, the here is no contradiction in the fact that, on the one hand, the Commission favours a large public debate on the issue and takes into account all opinions expressed, but that, on the other hand, it needs to prepare its internal decision-making, in particular by receiving opinions of the different services. On the contrary, it is beneficial to the Commission's decision-making. Such opinions must remain internal, at least at this stage of the procedure, in order to allow the Services to express their opinions freely and to allow the Commission to prepare its decisions having at its disposal all the elements it requires. This protection is even more important for opinions of the Legal Service. These opinions are only supposed to support the Commission's decision-making, but should not prejudge a decision by the College of Commissioners that could also be contrary to its conclusions.

In consequence, I consider that, in the present situation, the prevailing interest is the Commission's interest in protecting the opinions of its Legal Service, and in protecting its decision-making process.

Therefore, I consider that in this case there is no overriding public interest that would outweigh the interests protected by Article 4(2), second indent and by Article 4(3), first subparagraph of Regulation 1049/2001.

7. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,



Catherine Day

Ref. Ares(2012)399467 - 03/04/2012



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels,
SG.B.5/MIA/psi – Ares(2012)

Mr Patrick Breyer

By e-mail only:

Ständige Vertretung der Republik Österreich
S.E. Herrn Walter Grahammer

By e-mail only:

Subject: Confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2011/1748

Dear Sirs,

On 13 July 2011, the applicant lodged a confirmatory application for access to documents, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[1] (hereafter: Regulation n° 1049/2001).

With this confirmatory application, the applicant requested a review of the position taken by the Director-General for Home Affairs (hereafter DG HOME) on 11 July 2011, in its reply to his initial application dated 30 April 2011.

1. CONTEXT

Under Article 258 TFEU, the Commission initiated in 2007 infringement proceedings (n° 2007/1036) against Austria, for non-communication of the national implementing measures regarding Directive 2006/24/EC[2] on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. Given the failure to transpose this Directive within the prescribed period, the Commission brought the case to the Court of Justice.

---

1 OJ L145, 31.05.2001, p. 43.

2 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105 of 13/04/2006 Pages: 0054-0063.

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111
http://ec.europa.eu/dgs/secretariat_general/
E-mail: sg-acc-doc@ec.europa.eu

In its judgment of 29 July 2010 in case C-189/09, the Court of Justice decided that:

"... by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, the Republic of Austria has failed to fulfil its obligations under that directive."

After this judgment, the Commission monitored its implementation by Austria and since the latter did not communicate the national transposing measures, the Commission launched further infringement proceedings under Article 260 TFEU. A letter of formal notice was sent to Austria on 14 March 2011.

Despite the fact that the Austrian authorities adopted and communicated to the Commission on 27 May 2011 national legislation transposing Directive 2006/24, the Commission has not closed its proceedings under Article 260 TFEU since it is still examining certain provisions of that legislation. Consequently, these proceedings are still ongoing.

2. Scope of this Decision

In his confirmatory application, the applicanty requested:

'all documents related to the European Court case C-189/09 against Austria' and *'all other documents relating the transposition or non-transposition of directive 2006/24/EC by Austria and Germany [including] infringement proceedings against Austria and Germany for not transposing directive 2006/24/EC'.*

2.1. The decisions of 5 October 2011 and 12 December 2011

The Commission has replied to parts of the confirmatory application in two previous decisions of 5 October 2011 and 12 December 2011. With these decisions, the Commission granted access to the documents related to the closed infringement proceedings n° 2007/1071 against Germany. However, access to the documents related to infringement proceedings n° 2011/2091 against Germany, which are still ongoing, has been refused. The applicant was further informed that a separate decision would be taken with regard to the documents related to case C-189/09 against Austria and the transposition of the above-mentioned Directive. At that time, the consultations with the Austrian authorities were ongoing.

2.2. The present decision

Consequently, the present decision concerns:

- The documents belonging to the administrative file of the above-mentioned infringement proceedings n° 2007/1036 under both Article 258 and Article 260 TFEU. The documents concerned include the correspondence exchanged between the Commission and Austria as well as the Commission's internal documents. These documents are listed under items **(1)** to **(13)** and **(15)** of the enclosed list;
- The submissions addressed to the Court of Justice in the framework of case C-189/09. The documents submitted by the Commission to the Court are listed under items **(16)** and **(17)** of the enclosed list. The Commission's position on documents submitted by Austria to the Court is set out below.

The legislation communicated by Austria to the Commission, mentioned under item **(14)**, has been published[3]. Therefore, there is no need to take a position on this document.

Concerning submissions to the Court lodged by Austria, the Commission takes the view that they do not fall within the scope of Regulation 1049/2011 and therefore, they are not covered by the request.

Regulation (EC) N° 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[4] is based on ex-Article 255 of the EC Treaty. This Article has been replaced with Article 15(3) TFEU which provides that the European Court of Justice shall be subject to the rules on access to documents only when exercising its administrative tasks.

It must be observed, firstly, that the concerned submissions were addressed to the Court of Justice, and not to the Commission, which only received copies of these submissions as a party in the proceedings. Secondly, pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, written submissions are only communicated to the other parties and to the institutions, whose decisions are in dispute. In addition, Article 16(5)[5] of the Rules of the Procedure of the Court of Justice, foresee the possibility that *"[p]ersons having an interest may consult the register at the Registry and may obtain copies or extracts on payment of a charge on a scale fixed by the Court on a proposal from the Registrar. The parties to a case may on payment of the appropriate charge, also obtain copies of pleadings and authenticated copies of judgments and orders."* Similarly, Article 5(7) of the Instructions to the Registrar of the Court of First Instance[6] states that: *"[n]o third party, private or public, may have access to the case file or to the procedural documents without the express authorization of the President [...] after the parties have been heard. That authorisation may be granted only upon written request accompanied by a detailed explanation of the third party's legitimate interest in inspecting the file"*.

---

3 Bundesgesetz, Nummer: I Nr. 27/2011; Amtsblatt: Bundesgesetzblatt für die Republik Österreich (BGBl.), Nummer: I Nr. 27/2011, Datum der Veröffentlichung: 18/05/2011, Inkrafttreten: 19/05/2011. Also accessible on Eur-Lex: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72006L0024:EN:NOT#FIELD_AT

4 OJ L 145, 31.05.2001, page 43.

5 http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/txt5.pdf.

6 OJ L 232, 04.09.2004, page 1.

Furthermore, in its judgment of 21 September 2010[7], the Court of Justice did not address the issue whether institutions should grant access to submissions other than their own.

For these reasons, the Commission takes the view that, as far as documents submitted in court proceedings are concerned, the scope of Regulation 1049/2001 is limited to the institution's own submissions, whereas submissions lodged by the other parties do not fall within its scope. Otherwise, the purpose of both the provision of the Article 15 TFEU, the Statute and the Rules of Procedure of the Court of Justice would be undermined.

Finally, by order of 9 December 2009, the Council was granted the right to intervene in Case C-189/09 at the stage of the oral procedure. However, since the Court decided on the case without a hearing, there are no Council documents falling within the scope of the request.

3. EXAMINATION OF THE DOCUMENTS CONCERNED AND CONCLUSIONS

After a detailed examination of the documents identified in the enclosed list, I have reached the following conclusions:

- Full access is granted to the documents drawn-up by the Commission and relating to proceedings under Article 258 TFEU, including court proceedings. These documents are identified under items **(1)**, **(2)**, **(5)**, **(16)**, and **(17)** of the enclosed list. Copies are enclosed to this decision.
- Full access can also be granted to the documents originating from Austria and belonging to the administrative phase of the above-mentioned infringement proceedings under Article 258 TFEU. These documents are identified under items **(3)** and **(4)** of the enclosed list. However, they cannot be transmitted to the applicant at this stage for the reasons explained below.
- Partial access is granted to document **(15)**, a copy of which is also enclosed. However, access is refused to the entirety of documents under items **(6)** to **(13)** and to the non-disclosed parts of the document under item **(15)** for the reasons set out below. These documents have been established either by the Commission [documents (6), (7) and (15)] or by the Member State [documents (8) to (13)]. These documents form part of the administrative file of the procedure under Article 260 TFEU.

The reasons for this decision are set out below.

[7] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Association de la Presse Internationale (API)* judgment of 21 September 2010, *not yet reported*

4. MOTIVATION REGARDING DOCUMENTS (3) AND (4)

Since documents (3) and (4) originate from Austria, the Commission asked the Austrian authorities for their opinion pursuant to Article 4(5) of Regulation No 1049/2001 which provides that a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

The Commission reminded the Austrian authorities of the judgment of the Court of Justice's of 18 December 2007[8]. According to this judgment, if a Member State objects to the disclosure of documents originating form it, it must state reasons capable of showing that one (or more) of the exceptions to the right of access in Article 4(1) to (3) of Regulation No 1049/2001 applies. The Commission also referred to the judgement in the *API* case[9] in relation to the disclosure of documents once the Court has delivered a judgment under Article 258 and that judgment is followed by proceedings under Article 260 TFEU.

4.1. Position of the Member State

During the dialogue established with the Commission, the Austrian authorities objected to the disclosure of the above-mentioned documents on the ground that their disclosure would undermine the protection of court proceedings, in accordance with Article 4(2), second indent, of Regulation (EC) No 1049/2001.

The Austrian authorities emphasised that, although the College is examining whether to close the case, the infringement proceedings under Article 260(2) TFEU are still formally pending. It is important, particularly at this stage, that the discussions between the European Commission and the Republic of Austria on the closure of the case take place in an atmosphere of total serenity.

The Austrian authorities add that the dissemination of written submissions, while proceedings are still pending, could undermine the protection of the proceedings as provided for by Article 4(2), second indent, of Regulation (EC) No 1049/2001, especially where politically sensitive discussions are ongoing.

In Austria's view, no distinction may be drawn between the various stages of the proceedings for the purposes of the application of Article 4(2), second indent, of Regulation (EC) No 1049/2001 in relation to the disclosure of documents submitted in infringement proceedings. In this respect, they consider that the judgment of the Court of Justice in joined Cases C-514/07 P, C 528/07 P and C-532/07 P, *API*, only applies to the interpretation of Article 4(2), third indent, of Regulation (EC) No 1049/2001.

---

[8] Judgment of the Court of Justice of 18 December 2007 in Case C-64/05 Sweden v Commission [2007] ECR I-11389

[9] See footnote 7.

According to the Austrian authorities, the protection of court proceedings under Article 4(2), second indent of Regulation (EC) No 1049/2001 is in this context defined in wider terms than the exception aimed at protecting the purpose of investigation set out in Article 4(2), third indent, in so far it applies to the preliminary stages of the infringement proceedings as well as to the Article 258 and Article 260 phases[10].

In their view, the confidentiality of a dialogue aimed at achieving an amicable solution must be safeguarded, and this also applies in the context of an exchange of views between the European Commission and the Member State concerned prior to any court proceedings under Article 260(2) TFEU. Such a dialogue must be based on information and opinions exchanged freely and free from any external influence. It is a prerequisite that each party to the proceedings must be able to set out its standpoint in circumstances that do not place it at a clear disadvantage vis-à-vis the other party.

They conclude that such an objective cannot be achieved if documents are disclosed since they belong to complaints and infringement proceedings under Article 258 TFUE, which take place before court proceedings are initiated. They also consider that the Court conclusions in *API*[11] regarding access to the pleadings addressed to the Court apply *mutatis mutandis* to written submissions exchanged between the Commission and the Member State in the framework of the administrative phase of infringement proceedings under Article 258 TFEU. They add that the letter of formal notice, as well as the reasoned opinion, is sent to the Court with the Commission's application and are, therefore, an integral part of the Court's file. They also consider that procedures under Article 258 and 260 TFEU are closely linked, since a "260" procedure under Article 260 cannot be opened before a procedure under Article 258 is closed, even if these two procedures have a different subject-matter. In their view, the "court proceedings" exception should apply not only to a "stand alone" judicial procedure under Article 258 but also to a procedure under Article 260, including its administrative phase, since these procedures are so closely linked. In their view, the disclosure of the documents exchanged with the Commission in the context of proceedings under Article 258 before proceedings under Article 260 TFEU are closed would call into question the system of procedural rules governing the court proceedings before the EU Courts.

The Austrian authorities recognised that, at paragraph 122 of the *API* judgment, the Court rejected the presumption according to which documents relating to proceedings under Article 258 should be covered by an exception to the right of access until the proceedings under Article 260 are closed. However, they consider that the Court's findings concern the exception under Article 4(2), third indent. In their view, the "court proceedings" exception allows for a different interpretation since it is defined in a more open way.

---

[10] *"...der „Schutz von Gerichtsverfahren" nach Art. 4 Abs. 2 zweiter Spiegelstrich der Verordnung (EG) 1049/2001 in diesem Zusammenhang weiter gefasst ist als der Schutz des „Zwecks von (...) Untersuchungs[tätigkeiten]" nach Art. 4 Abs. 2 dritter Spiegelstrich leg. cit., und er sich sowohl auf das Vorverfahren, als auch auf ein Vertragsverletzungsverfahren nach Art. 258 AEUV und ein solches nach Art. 260 AEUV erstreckt."]* Quoted from the original text in German

[11] See footnote 7, points 91 à 100

Finally, as regards Article 4(5) of Regulation 1049/2001 and the nature of the Commission's appraisal of the Member State's reasoning, the Austrian authorities recall paragraph 88 of the judgment of the Court in case C-64/05 P. They maintain that an institution can only disclose the documents originating from a Member State against its refusal if its position is not entirely unaccompanied by a statement of reasons or that the reasons given are not framed in terms of the substantive exceptions listed in Article 4(1), (2) and (3) of Regulation No 1049/2001.

4.2. Evaluation by the Commission

The Commission has examined the Member State's arguments in order to determine whether they are *prima facie* proper. During this examination, the Commission took into account the interpretation of the exception invoked by the Member State, by the General Court and by the Court of Justice.

The Commission wishes to recall that, according to settled case law, the exceptions to the right of access must be interpreted and applied strictly and that the risk to an interest protected must be reasonably foreseeable and not purely hypothetical.

The Commission does not deny that the requested documents, namely the replies to a letter of formal notice and to a reasoned opinion, are highly relevant in the framework of the court proceedings under Article 258 TFEU and may also be protected by the exception relating to court proceedings. However, the risk to the interests protected by the exception aimed at protecting court proceedings as defined by the Court of Justice in its *API* judgment[12] must be reasonably foreseeable and not merely hypothetical. Since the proceedings under Article 258 are closed, a general presumption according to which disclosure of the concerned documents would undermine the protection of past or of possible future court proceedings cannot be accepted. This interpretation is confirmed by paragraphs 130-131 of the *API* judgment where the Court stated that, once the proceedings are closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court since those activities come to an end with the closure of the proceedings. This reasoning is also valid for the documents exchanged during the administrative phase of the proceedings and which form an integral part of the Court's file.

Consequently, the Austrian authorities should provide specific reasons capable of showing that disclosure of the documents concerned would specifically and effectively undermine the interests protected by the invoked exception.

---

[12] Cited under footnote 7. See in particular para. 85: "[...] it should be noted that the protection of court proceedings implies, in particular, that compliance with the principles of equality of arms and the sound administration of justice must be ensured."

In this regard, it is appropriate to recall the circumstances of the procedures in question. Firstly, proceedings under Article 258 TFEU were closed with the judgment of the Court in Case C-189/09. Secondly, the Commission launched a procedure under Article 260 aimed at ensuring implementation of the judgment of the Court in that Case, i.e. transposition of Directive 2006/24 into national law. Following the letter of formal notice, the Austrian authorities have communicated to the Commission the national measures transposing that Directive. Thirdly, the Commission is examining certain provisions of those measures in the context of the proceedings under Article 260 TFEU. However, should the Commission reach the conclusion that the national legislation fails to entirely or correctly transpose the Directive, a possible future action before the Court would, in any event, have a different subject matter from the action under Article 258 TFEU.

Consequently, in the Commission's view, the objection of the Austrian authorities to disclosure of documents under items (3) and (4) cannot be considered *prima facie* duly substantiated. Under these circumstances, the Commission is required to make its own assessment of the documents concerned in accordance with paragraph 88 of the judgment of 18 December 2007[13].

With regard to the arguments of the Austrian authorities as to the nature of the Commission's assessment of the objections of a Member State, the Commission wishes to refer to a recent judgment of the General Court in case T-59/09[14]. The General Court confirmed that the institution is *"...empowered to make sure that the grounds relied upon as justification for the Member State's objection to disclosure of the document requested, which must be given in the decision refusing access, adopted in accordance with Article 8(1) of Regulation No 1049/2001, are not unfounded."*

The General Court also underlined that the institution's review of the Member State's position is aimed at *"...preventing the adoption of a decision which it does not consider to be defensible".* The review *"... by the institution consists in determining whether, in the light of the circumstances of the case and of the relevant rules of law, the reasons given by the Member State for its objection are capable of justifying prima facie such refusal [...] and, accordingly, whether those reasons make it possible for that institution to assume the responsibility conferred on it under Article 8 of Regulation No 1049/2001. "*

Against this background and after a detailed examination of the requested documents under items (3) and (4) of the enclosed list I reached the conclusion that there is no exception set out in Regulation 1049/2001 which is applicable to them. Consequently, these documents shall be disclosed.

---

[13] Judgment of the Court of Justice of 18 December 2007, Case C-64/05 Sweden v Commission [2007] ECR I-11389.

[14] Judgment of the General Court of 14 February 2012, Case T-59/09 Germany v Commission (paragraphs 51, 53 and 54) (not yet reported).

However, since this decision is taken against the objections of the Member State from which the requested documents originate, the Commission will inform the Austrian authorities of this decision. The Commission will not disclose the documents until a period of ten working days has elapsed in accordance with Article 5(6) of the detailed rules for the application of Regulation No 1049/2001 attached to Decision No 2001/937/EC, ECSC, Euratom[15].

This time-period will allow the Austrian authorities to inform the Commission whether they object to the disclosure using the remedies available to them, i.e. an application for annulment and interim measures before the General Court. Once this period has elapsed, if the Austrian authorities have not signalled their intention to appeal against this decision by the means referred to above, the Commission will forward the above documents to the applicant.

5. EXAMINATION OF DOCUMENTS (6) TO (13) AND (15)

The requested documents described under items **(6)** to **(13)** and the non-disclosed parts of the document under item **(15)** have been drawn-up following the judgment of the Court of Justice of 29 July 2010 in case C-189/09. The documents are part of a follow-up investigation concerning the implementation of this judgment, which may lead to a request for a penalty under Article 260 TFEU. Despite the fact that the Austrian authorities have adopted national legislation transposing Directive 2006/24, these proceedings are not closed since, as indicated above, the Commission is examining certain provisions of that legislation. The documents exchanged contain the discussions between Austria and the Commission concerning the conditions and the appropriateness of these infringement proceedings. The file also contains internal documents containing the assessment of the infringement by Commission services. All these documents are relevant for a decision to be taken by the College regarding these infringement proceedings.

Under these circumstances, early disclosure of the entirety of documents **(6)** to **(13)** and of the non-disclosed parts of document **(15)** will adversely affect the dialogue between the Austrian authorities and the Commission. Consequently, the purpose of this investigation, which is to achieve conformity with EU law without, if possible, having recourse to the means provided for under Article 260(2) TFEU, would be undermined. In order to reach this aim, extensive discussions with the Member State concerned are necessary, which require a climate of mutual trust. Disclosure of the documents concerned at this stage would seriously undermine the atmosphere of mutual trust between the Austrian authorities and the Commission.

This interpretation has been confirmed by the Court of First Instance (now General Court) in particular in paragraph 68 of the *Petrie* judgment[16].

---

15 OJ L 345, 29.12.2001, p. 94.

16 Judgment of 11 December 2001 in the case T-191/99, [2001] ECR II-3677.

This paragraph states that *" [...] [a]s the Court pointed out in paragraph 63 of its judgement in WWF (cited above in paragraph 59), the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgement of the Court of Justice.[...]"*

Contrary to the opinion expressed by the applicant in the confirmatory application, this reasoning is applicable in this case. The ECJ held in paragraph 122 of the judgment in the case *Sweden v API and Commission*[17] that *"it cannot be presumed that disclosure of pleadings lodged in a procedure which ultimately led to the delivery of a judgment on the basis of Article 226 EC*[18] *undermines investigations which could lead to proceedings being brought under Article 228 EC"*[19]. The Court argued that these *"constitute two distinct procedures, each with its own subject-matter"*.

However, in contrast to the documents in the *Sweden v API and Commission* case, documents **(6)** to **(13)** and the non-disclosed parts of document **(15)** of the request do not stem from the preceding procedure under Article 258 TFEU, which was closed by the judgment of 29 July 2010, but were originally drawn up in course of the procedure under Article 260 TFEU, which is still ongoing.

Following the above considerations, disclosure of documents, which have been drawn up in the framework of the procedure under Article 260 TFEU, can indeed *undermine investigations, which could lead to proceedings being brought under this provision*, a distinct, investigative procedure with its own subject matter. This is precisely the case for the entirety of the documents mentioned in the enclosed list under items **(6)** to **(13)** and for the non-disclosed parts of document **(15)**. As outlined above, their disclosure would seriously affect the climate of mutual trust necessary for successful negotiations between the Austrian authorities and the Commission on the modalities of the fulfilment of the obligations under EU law, thus undermining the purpose of this investigation.

---

[17] Judgment of 21 September 2010 in the joined cases C-514/07 P, C-528/07 P and C-532/07 P, not yet reported

[18] Now Article 258 TFEU

[19] Now Article 260 TFEU

In addition to this, it is to be noted that in interpreting Article 4(2), third indent, of Regulation No 1049/2001 the Court of Justice has emphasised the bilateral nature of an administrative procedure between the Commission and the Member State concerned. Indeed, the Court stated in paragraph 58 of the judgment of 29 June 2010 in case C-139/07 P[20] that "*the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file. Account must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent, of Regulation No 1049/2001. If those interested parties were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's administrative file, the system for the review of State aid would be called into question*". As in a procedure for reviewing State aid, infringement proceedings based on Article 260 TFEU are of a bilateral nature in which the Commission's position is addressed only to the Member State concerned. Consequently, the above interpretation by the Court of Justice applies directly in infringement proceedings.

In the light of the above, I consider that access to the documents **(6)** to **(13)** and to the non-disclosed parts of document **(15)** has to be refused since they are covered by the exception provided for in Article 4(2), third indent, of Regulation 1049/2001, which provides that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: (...) the purpose of inspections, investigations and audits*".

5.1. Partial access

I have also examined the possibility of granting partial access to the refused documents, under items **(6)** to **(13)** in accordance with Article 4(6) of Regulation 1049/2001. However, partial access is not possible considering that they are at this stage of the infringement proceedings entirely covered by the exception under Article 4(2), third indent of the Regulation.

5.2. Overriding public interest in disclosure

The exception laid down in Article 4(2), third indent of the Regulation must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. The issues at stake are undoubtedly of public interest and warrant an infringement procedure under Article 260 TFEU.

However, I consider that in this particular case, the public interest is better served by protecting the purpose of the investigation in the ongoing infringement proceedings namely obtaining Austria's compliance with the judgment of the Court of 29 July 2010 and with its obligations under EU law

---

[20] Judgment of 29 June 2010 in the case C-139/07 P, Commission v Technische Glasswerke Ilmenau, not yet reported.

Consequently, I see no elements capable of showing the existence of an overriding public interest.

6. Means of Redress for the Applicant

The applicant may challenge this decision, insofar as no access is granted to documents (6) to (13) and to parts of document (15), either by bringing proceedings before the General Court or by filing a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



Catherine Day

Enclosures: List of documents
Six documents (one expunged)